

# **TAXABILITY OF TRIBAL GOVERNMENT-PROVIDED GENERAL WELFARE BENEFITS**

## Current Law

Both the IRS and the courts have defined income broadly, limiting exclusions to those specified in the Tax Code. Part III of subchapter B of chapter 1 of the Internal Revenue Code of 1986 acknowledges more than 3 dozen types of benefits / payments as “items specifically excluded from gross income.” The Tax Code is silent on the issue of whether the programs and services that tribal governments provide to tribal citizens are subject to federal income tax.

In addition, the IRS has employed an administrative practice, known as the General Welfare Exclusion (“GWE”), which excludes benefits and payments to individuals from federal income taxation when those benefits and payments are made pursuant to a governmental program serving the general welfare and do not represent compensation for services. On December 5, 2012, the IRS issued Notice 2012-75 (“Draft Guidance”), which creates certain ‘safe harbors’ which allow tribal governments to provide certain programs and services to their citizens on a tax-free basis consistent with the GWE.

## Reasons for Change

While the Draft Guidance is a positive step, it is not permanent and the IRS retains subjective authority to set tribal tax policy on an ad hoc basis without reference to the Federal Government’s legal, treaty, trust, and statutory obligations to Indian tribes.

Congress addressed a related general welfare policy issue in prior legislation to clarify that tribal government-provided health insurance and related benefits are exempt from federal income taxation. Despite this statutory clarification, the IRS expanded the scope of its audits and examinations of tribal government programs and services to other general welfare matters. In light of the Draft Guidance set forth in Notice 2012-75, the proposal should produce a negligible impact on federal tax revenues.

## Proposal

Like the recent tribal health benefits amendment, this proposal would amend Part III of subchapter B of chapter 1 of the Internal Revenue Code of 1986 do the following:

1. Clarify that the following programs and services provided by federally recognized Indian tribes to their citizens are exempt from federal income: housing, education, care for elders and the disabled, culture and religion, public transportation, emergency assistance, programs or services denoted in treaty provisions, and programs or services authorized or administered under federal law for the benefits of Native Americans because of their political status as tribal citizens.
2. Clarify that certain benefits provided under an Indian tribal governmental program that are items of cultural significance or cash honoraria provided to medicine men or women, shamans, or similar religious or spiritual officials to recognize their participation in cultural, religious, and social events (for example, pow-wows, rite of passage ceremonies, or funerals, wakes, burials, or other bereavement events) shall not represent compensation for services and shall be excluded from income.

3. Establish a Tribal Advisory Committee (TAC) within Treasury to advise the Secretary on matters of Indian taxation generally and to assist specifically in developing criteria to implement this amendment to the tax code.
4. Require a more rigorous and accountable training and education program by which IRS field agents carry out their functions consistent with principles of federal Indian law and the Federal Government's unique legal treaty and trust relationship with Indian tribes; and to orient the training of IRS field agents so they have the knowledge, skills and abilities to provide training and technical assistance to tribal financial officers for the purpose of implementing this amendment.

#### Additional Considerations

Provide time frames and standards for IRS to complete the education and training program for field staff regarding the federal government's unique obligations to tribes, the federal policy of tribal self-determination, and the Department's Draft Guidance contained in Notice 2012-75. Suspend IRS examinations and audits until IRS reports to Congress on the completion of its education and training program and its fulfillment of its duty to consult with tribal governments for the revision of IRS's ADAPT standards consistent with the recommendations of the Inspector General.